MOHAMAD RADHI YAAKOB

v.

PUBLIC PROSECUTOR

SUPREME COURT, KUALA LUMPUR
MOHD. JEMURI SERJAN CJ (BORNEO)
MOHD. AZMI SCJ
WAN YAHYA J
[SC CRIMINAL APPEAL NO. 05-59 OF 1989]
20 JULY 1991

CRIMINAL PROCEDURE: *Dangerous drugs - Presumption of possession and trafficking - Burden of proof - To rebut - Onus - Falsity of defence story does not relieve the prosecution from proving case beyond reasonable doubt - Acquittal at close of prosecution case - Duty of Court - Dangerous Drugs Act 1952, s. 37(d), (da).*

The appellant was convicted and sentenced to death on a charge of trafficking in cannabis. This was an appeal against conviction and sentence. The Supreme Court examined whether the trial Judge, notwithstanding the decision that the defence story was a falsity, had considered whether there was a reasonable doubt cast on the prosecution case.

The other crucial issue was the manner in which the learned Judge approached the law on the right of the appellant to rebut the two applicable statutory presumptions under s. 37 (d) and (da) of the Dangerous Drugs Act 1952 (the Act).

Held:

[1] As the quantity of drugs found exceeded 199 grammes, and as the prosecution could rely on the statutory presumption under s. 37(da) of the Act to prove that the appellant was trafficking in dangerous drugs, the learned Judge was correct in calling for the defence after holding that the prosecution had made out a *prima facie* case against the appellant, which if unrebutted would warrant a conviction.

[2] Whenever a criminal case is decided on the basis of the truth of the prosecution case as against the falsity of the defence story, a trial Judge must in accordance with the principle laid down in *Mat v. PP* examine whether even though the Court is not satisfied with the defence story, to ask whether in spite of this, the defence story casts a reasonable doubt on the prosecution case. To satisfy this test, of importance is not the words used by the Judge but rather the actual application of the test to the facts of the case. In this case, the learned Judge offered practically no reason why the defence notwithstanding its falsity and unconvincing nature, had failed to cast a reasonable doubt on the prosecution case, other than to state by way of lip service the duty placed by the law on the defence to earn an acquittal.

[3] Unless the evidence in a particular case does not obviously so warrant, it is incumbent for the Court to consider whether on a balance of probability on the evidence the defence has rebutted the statutory presumption of trafficking under s. 37(da) of the Act as a separate exercise even though the Court is satisfied on a balance that the presumption of possession under s. 37(d) of the Act has not been rebutted. In this case, the failure to do so was a material misdirection and was fatal to the conviction.

[4] On the issue of trafficking, the learned Judge had failed sufficiently to consider the evidence of defence witnesses, particularly that of DW9 which clearly indicated that on the night in question H was in all probability the trafficker of the cannabis. The learned Judge had acted on the wrong premise that once the appellant had failed to rebut the presumption of possession under s. 37(d) of the Act, the presumption of trafficking under s. 37(da) of the Act became irrebuttable so as to relieve the Court from the duty to consider separately on a balance of probabilities whether the presumption under s. 37(da) of the Act had been rebutted; this error of law had occasioned a miscarriage of justice.

[Appeal allowed; conviction quashed and death sentence set aside; conviction under s. 12(2) of the Act substituted.]

[Bahasa Malaysia translation of headnote]

UNDANG-UNDANG & PROSEDUR JENAYAH: *Dadah merbahaya - Anggapan pemilikan dan pengedaran - Beban bukti - Penyangkalan - Onus - Kepalsuan pembelaan tidak meringankan beban pihak pendakwa untuk membuktikan kes hingga tidak ada keraguan munasabah - Pembebasan diakhir kes pendakwa - Kewajipan Mahkamah - Akta Dadah Merbahaya s. 37(d) dan (da).*

Perayu dalam kes ini didapati bersalah dan dihukum mati atas tuduhan mengedar dadah cannabis. Ini adalah rayuan beliau terhadap sabitan dan hukuman. Mahkamah dikehendaki meneliti samada Hakim Mahkamah Tinggi telah menimbangkan samada terdapat keraguan munasabah yang telah di tebar keatas kes pendakwa, walaupun Hakim yang arif telah memutuskan bahawa pembelaan tidak dapat diterima atas sebab kepalsuan.

Mahkamah juga meneliti pendekatan Hakim yang arif mengenai hak perayu untuk menyangkal anggapan statutori di bawah Akta Dadah Merbahaya 1952 (Akta tersebut).

Diputuskan:

[1] Hakim yang arif membuat keputusan yang betul apabila beliau memerintah tertuduh membela diri atas dasar bahawa pihak pendakwa telah membuktikan kes *prima facie* terhadap tertuduh yang sekiranya tidak disangkal akan menjamin (warrant) kesabitan. Keputusan itu adalah wajar oleh kerana berat dadah yang dijumpai melebihi 199 grammes yang seterusnya menimbulkan anggapan statutori di bawah s. 37(da) Akta tersebut untuk membuktikan bahawa yang tertuduh mengedar dadah berbahaya.

[2] Berasaskan keputusan didalam kes *Mat lwn. PR*, walaupun Mahkamah tidak menerima keesahan cerita pembelaan, Hakim yang arif perlu meneliti sama ada pembelaan dapat menimbulkan keraguan munasabah ke atas kes pendakwa. Yang penting bukanlah perkataan yang digunakan oleh Hakim, tetapi pemakaian ujian tersebut pada fakta kes. Dalam kes ini, Hakim yang arif tidak memberi sebab mengapa pembelaan tidak menebarkan (cast) keraguan munasabah ke atas kes pendakwa. Beliau hanya menyuarakan kewajipan pembelaan untuk menuntut pembebasan.

[3] Walaupun Mahkamah berpuas hati atas imbangan barangkalian bahawa anggapan satutori pemilikan (possession) di bawah s. 37(d) Akta tersebut tidak dapat disangkal, adalah mustahak bagi Mahkamah meneliti samada pihak pembelaan atas imbangan barangkalian dapat menyangkal anggapan statutori pengedaran di bawah s. 37(da) Akta tersebut. Kedua-dua penelitian mesti dibuat secara berasingan. Di dalam kes ini, kegagalan Mahkamah membuat demikian merupakan arahan salah yang material yang mengakibatkan sabitan tersebut.

[4] Hakim yang arif telah gagal menimbangkan keterangan saksi pembelaan, terutamanya keterangan DW9 yang dengan jelasnya menunjukkan bahawa pada malam tersebut, terdapat kemungkinan besar bahawa H adalah pengedar dadah tersebut. Hakim yang arif telah membuat keputusan di atas premis yang salah apabila beliau menganggap bahawa kegagalan tertuduh menyangkal anggapan pemilikan di bawah s. 37(d) Akta tersebut bermakna bahawa perayu juga telah gagal menyangkal anggapan pengedaran di bawah s. 37(da) Akta tersebut. Kegagalan menyangkal sesuatu daripada kedua-dua anggapan tidak meringankan kewajipan Mahkamah untuk meneliti anggapan yang satu lagi. Kesilapan undang-undang ini telah menyebabkan salah laksana keadilan.

[Rayuan dibenarkan; sabitan dibatalkan dan hukuman mati diketepikan; sabitan di bawah s. 12(2) Akta tersebut digantikan.]

Cases referred to:
Mat v. PP [1963] MLJ 263 ***(cit)***
Munusamy v. PP [1987] CLJ (Rep) 221 ***(foll)***
PP v. Saimin & Ors. [1971] 2 MLJ 16 ***(dist)***

Legislation referred to:
Criminal Procedure Code, ss. 173(f), 180
Dangerous Drugs Act 1952, ss. 12(2), 37(d),(da), 39B(1)(a), (2)

For the appellant - Karpal Singh; M/s. Karpal Singh & Co.
For the respondent - Foo Lee Mei, DPP

JUDGMENT

Mohd. Azmi SCJ:

The appellant was convicted and sentenced to death on a charge of trafficking in 544.18 grammes of cannabis in the following amended terms:

> That you on 12 July 1986 at about 1.20 a.m. at Kampong Tengah of Batu Kikir, in the District of Jempol, in the State of Negeri Sembilan Darul Khusus, did on your own behalf traffic in dangerous drug, to wit 544.18 grammes of cannabis and that you have thereby committed an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (Revised 1980) and punishable under s. 39B(2) of the same Act.

In this case the learned trial Judge had accepted the prosecution evidence that on 11 July 1986 at about midnight a party of four police officers led by Inspector Zabidi (PW2) were on motorcycle crime prevention patrol at Kampong Tengah, Jempol. At about 1.20 a.m. (12 July 1986) as the police party was leaving the kampung road for the main road, they came across the appellant walking with another man identified as one Hashim. The learned Judge had no reason to disbelieve the evidence of the police that at the material time the appellant was carrying the cannabis in a bag slung across his shoulders, and when Inspector Zabidi stopped them and identified himself as a police officer, Hashim ran away while the appellant threw the bag he was carrying into the padi field by the side of the road. Despite being pursued by the police, Hashim apparently managed to escape and could not be traced until today, but the appellant was apprehended after a short struggle although he denied trying to run away.

From the evidence of the Government Chemist, Mr. Ho Peng Hee (PW2) it was established beyond doubt that the 1,773 paper rolls carried by the appellant contained 544.18 grammes of cannabis as defined in s. 2 of the Dangerous Drugs Act 1952. The prosecution relied on

the statutory presumption under s. 37(d) of the Act that the appellant being in custody or control of the bag containing the dangerous drug should be presumed until the contrary was proved to have been in possession of such drug, and also should until the contrary was proved be deemed to have known that the drug was cannabis. Since the quantity of cannabis recovered exceeded 199 grammes, the prosecution also relied on the statutory presumption under s. 37(da) to prove that the appellant was trafficking in the said dangerous drug.

The learned Judge was accordingly correct in law in calling for the defence after holding that the prosecution had made out a *prima facie* case against the appellant which if unrebutted would warrant a conviction.

The appellant gave evidence on oath and called eight other witnesses to prove firstly that Hashim was the owner of the bag containing the cannabis and that he was merely an innocent and momentary carrier of the bag, and secondly, it was Hashim and not he who was trafficking in the cannabis. The appellant's father (DW4) and mother (DW5), gave evidence to corroborate his story that Hashim was in their house that night watching TV until 11 p.m. when he and the appellant left the house to buy cigarettes. On arrival near the shop, the appellant went to purchase cigarettes whilst Hashim approached a group of three persons - DW6, DW7 and DW8 who were then sitting under a tree. When the appellant came out of the shop, he approached the three persons, one of whom was his own brother (DW7) and was informed that Hashim had gone away for a while on a motorcycle borrowed from one of them. So the appellant waited there for Hashim to return and had a chat with the three persons. After about one and half hours Hashim returned and was seen carrying a bag. The appellant and Hashim then walked back to the house of appellant's parents. On the way Hashim wanted to urinate and asked appellant to hold the bag for him momentarily. It was soon after this that police appeared on their motorcycles. He saw Hashim running away and he himself felt frightened and threw the bag away, but denied attempting to run away. After his arrest the appellant took the police to his parents' house where the police made a search and recovered clothing belonging to Hashim.

The shopkeeper Mustaffa bin Yusof (DW3), confirmed that the appellant did come and buy some cigarettes from his shop that night. ASP Mohd. Hanafiah bin Ismail (DW2) of the Anti-Narcotic Special Branch also testified of the abortive police attempts to trace the whereabouts of Hashim. There was however no dispute that at the time of the appellant's arrest, he was in the company of Hashim. In short Hashim was not a fictitious person.

The last defence witness was Norazam bin Mohamed (DW9). He testified that he was arrested the same night for possession of cannabis which he had purchased from Hashim. Fifty rolls of cannabis were sold to him on 11 July 1986 at about 5.00 p.m. The notes of evidence showed that in the course of cross-examination, the Deputy Public Prosecutor had referred him to his previous statement to the Police, but nothing further was done to impeach his credit, with the result that his evidence remained admissible for consideration by the Court on the issue of who was actually trafficking in cannabis on the night of 12 July 1986. The fact that Hashim was trafficking in drugs when he sold cannabis to Norazam was not seriously challenged; nor the fact of Norazam's arrest for possession of cannabis. There was therefore nothing inherently improbable that several hours later, Hashim continued to be trafficking in cannabis in that kampung when found in the company of the appellant.

In dealing with the defence, the learned trial Judge stated at p. 9 of his grounds of judgment as follows:

> The Court has taken time to consider very carefully all the evidence in its entirety. The onus on the defence is to rebut the statutory presumptions on the balance of probability, especially the presumption under s. 37(d) the presumption of possession and knowledge of the nature of the drug. Defence need not rebut the trafficking presumption of s. 37(da) if defence has succeeded in rebutting the presumption of s. 37(d). The defence can also raise a reasonable doubt where possible in the prosecution's case to be entitled to an acquittal.

Further down at p. 13 His Lordship continued:

> Was accused telling the truth? Were the three people (DW6, DW7 and DW8) sitting under the ketapang tree telling the truth? It is purely a question for the Court to evaluate the evidence and make a finding on who are telling the truth and who are not telling the truth.

In this connection, Counsel for the appellant had referred to us the case of *PP v. Saimin & Ors.* [1971] 2 MLJ 16 where Sharma J held that the falsity of the defence does not relieve the prosecution from proving the prosecution case beyond reasonable doubt. We are of the view that whenever a criminal case is decided on the basis of the truth of the prosecution case as against the falsity of the defence story, a trial Judge must in accordance with the principle laid down in *Mat v. PP* [1963] MLJ 263 go one step further before convicting the accused by giving due consideration as to why the defence story though could not be believed did not raise a reasonable doubt on the prosecution case. Thus, even though a Judge does not accept or believe the accused explanation, the accused must not be convicted until the Court is satisfied for sufficient reason that such explanation does not cast a reasonable doubt on the prosecution case. To satisfy this test it is not so much the words used by the Judge, but rather the actual application of the test to the facts of the case that matters. In this case, we found the learned trial Judge offered practically no reason why the defence notwithstanding its falsity and unconvincing nature, had failed to cast reasonable doubt on the prosecution case, other than to state by way of lip service the duty placed by the law on the defence to earn an acquittal.

It is a well established principle of Malaysian criminal law that the general burden of proof lies throughout the trial on the prosecution to prove beyond reasonable doubt the guilt of the accused for the offence with which he is charged. There is no similar burden placed on the accused to prove his innocence. He is presumed innocent until proven guilty. To earn an acquittal, his duty is merely to cast a reasonable doubt in the prosecution case. In the course of the prosecution case, the prosecution may of course rely on available statutory presumptions to prove one or more of the essential ingredients of the charge. When that occurs, the particular burden of proof as opposed to the general burden, shifts to the defence to rebut such presumptions on the balance of probabilities which from the defence point of view is heavier than the burden of casting a reasonable doubt, but it is certainly lighter than the burden of the prosecution to prove beyond reasonable doubt. To earn an acquittal at the close of the case for the prosecution under s. 173(f) or s. 180 of the Criminal Procedure Code, the Court must be satisfied that no case against the accused has been made out which if unrebutted would warrant his conviction (*Munusamy v. PP* [1987] CLJ (Rep) 221). If defence is called, the duty of the accused is only to cast a reasonable doubt in the prosecution case. He is not required to prove his innocence beyond reasonable doubt.

To earn an acquittal, the Court may not be convinced of the truth of the defence story or version. Raising a reasonable doubt in the guilt of the accused will suffice. It is not, however, wrong for the Court to be convinced that the defence version is true, in which case the Court must order an acquittal. In appropriate cases it is also not wrong for the Court to conclude that the defence story is false or not convincing, but in that instance, the Court

must not convict until it asks a further question that even if the Court does not accept or believe the defence explanation, does it nevertheless, raise a reasonable doubt as to his guilt? It is for this reason that in dealing with the defence story or explanation, the majority of Judges rightly prefer to adopt straight away the legally established "reasonable doubt" test, rather than to delve in the "believable and convincing" test before applying the "reasonable doubt" test.

The other crucial issue which had arisen in this appeal was the manner in which the learned Judge had approached the law on the right of the appellant to rebut the two applicable statutory presumptions under the Dangerous Drugs Act 1952. In the penultimate paragraph of his grounds of judgment the learned Judge said at pp. 115 to 116:

> It is a finding of fact that the defence has not rebutted the statutory presumption of s. 37(d) on the balance of probability at all **and it follows that presumption of s. 37(da) is also not rebutted.** Nor has the defence raised any reasonable doubt in the prosecution case. And it is a finding of fact that the prosecution's case against the accused has been proved beyond any reasonable doubt. (Emphasis supplied)

Whilst we could not disagree with what the learned Judge had said earlier in his judgment that if the defence had succeeded in rebutting the presumption of possession under s. 37(d), there was no need to rebut the presumption of trafficking under s. 37(da), it did not follow that the presumption of trafficking would become irrebuttable merely because the defence had failed to rebut the presumption of possession. In our opinion unless the evidence in a particular case does not obviously so warrant, it is incumbent for the Court to consider whether on a balance of probability in the evidence the defence has rebutted the statutory presumption of trafficking under s. 37(da) as a separate exercise even though the Court is satisfied on balance that the presumption of possession under s. 37(d) has not been rebutted. In this case, the failure to do so was a material misdirection and was fatal to the conviction.

On the issue of trafficking, we found the learned Judge had failed sufficiently to consider the evidence of defence witnesses, particularly that of DW9 which clearly indicated that on the night in question Hashim was in all probabilities the trafficker of the cannabis. In our view, the learned Judge had acted on the wrong premise that once the appellant had failed to rebut the presumption under s. 37(d), the presumption under s. 37(da) became irrebuttable so as to relieve the Court from the duty to consider separately on balance whether the presumption under s. 37(da) had been rebutted. In our view, on the facts of this particular case, this error of law had occasioned a miscarriage of justice.

We therefore allowed this appeal by quashing the conviction and setting aside the death sentence. In the circumstances of this case we substituted a conviction under s. 12(2) of the Dangerous Drugs Act 1952. Both the learned DPP and Counsel for the appellant informed us that the provision for increased punishment for possession of cannabis under s. 39A only came into force after the date of commission of this offence. In the circumstances, and after hearing submission in mitigation of sentence, we imposed a prison term of five years from today (21 May 1991), which was then the maximum term under the section before amendment.

Also found at [1991] 3 CLJ 2073